

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Baxter Healthcare Corporation, et al.,

No. C 07-1359 PJH (JL)

Plaintiffs,

v.

Fresenius Medical Care Holding, Inc.,

**ORDER DENYING BAXTER'S MOTION
TO COMPEL FURTHER RESPONSE TO
INTERROGATORY NO. 11
(Docket # 221)**

Defendants.

Introduction

This Court received the parties' joint statement regarding Baxter's motion to compel a further response from Fresenius to Baxter's Interrogatory 11. All discovery has been referred by the district court (Hon. Phyllis J. Hamilton), pursuant to 28 U.S.C. §636(b). The Court finds the matter to be suitable for submission without oral argument pursuant to Civil Local Rule 7-1(b).

Argument

Defendants' Liberty Cyclor is accused of patent infringement in this case. For the past several years, and during the entire time that this litigation has been pending, the Liberty Cyclor has undergone extensive changes during development and patient testing. Defendants have added and removed hardware and functions, modified the software (at least 700 times), and used various versions of the Liberty Cyclor during at least four

1 different patient testing periods. Baxter argues that it is entitled to know with certainty,
2 which infringing Liberty Cyclor features and characteristics were included in each different
3 version of the Liberty Cyclor at any given point in time. Given that Defendants produced
4 more than 2,500,000 pages of documents in this case, Baxter served Interrogatory 11
5 which asked Defendants to identify (by Bates number) specific categories of documents
6 (e.g., manuals, drawings, schematics, engineering change orders, bills of materials, parts
7 lists, and software) that correspond with each distinct—and potentially infringing—version
8 of the Liberty Cyclor that was sold, leased, offered for sale, used, tested, etc. Baxter asks
9 the Court to find that Defendants' response was deficient and to order a further response.

10 Baxter argues that Defendants' response to its Interrogatory 11 is deficient because
11 it improperly relies upon Rule 33(d), Federal Rules of Civil Procedure, and because, even
12 if proper, the tens of thousands of pages cited is not sufficient to fully respond to the
13 Interrogatory and Defendants admit that the production of remaining documents will not
14 occur for at least another three weeks.

15 During the parties' December 4, 2008, meet and confer, Defendants denied that
16 their response was improper while also admitting that: (1) the entire design history file has
17 not yet been produced; (2) "other potentially relevant documentation...separate from the
18 DHF" which is necessary to identify the document citations requested in Interrogatory 11
19 has not yet been produced; and (3) Defendants will now produce the complete design
20 history file and other "potentially relevant documentation" necessary to respond to
21 Interrogatory 11. A "design history file" is made up of historical records that document the
22 development of a medical device over time. This record is used to prove compliance with
23 FDA regulations and, as such, is subject to an audit by the FDA at any time.

24 Baxter argues that it is far less burdensome for Defendants than it is for Baxter to
25 provide the answer to Interrogatory 11. Defendants' merely listing tens of thousands of
26 pages, pursuant to Rule 33(d), is improper. Accordingly, Baxter asks the Court to compel
27 Defendants to respond further to Interrogatory 11 and identify each requested document by
28 individual Bates numbers that correspond to the different versions of the Liberty Cyclers.

1 Fresenius argues that Rule 33(d) permits it to respond to this interrogatory by
2 “specifying the records that must be reviewed in sufficient detail to enable the interrogating
3 party to locate and identify them as readily as the responding party could.” Fed. R. Civ. P.
4 33(d). Fresenius did precisely this by directing Baxter to the Design History File (“DHF”) for
5 the Liberty, a comprehensive, well-organized collection of relevant documentation
6 containing everything Plaintiffs seek in their interrogatory.

7 In response to Plaintiffs’ discovery requests, Fresenius provided the entire DHF prior
8 to commencement of formal discovery in this case, and that production was updated in
9 August of this year. In addition, Fresenius produced to Baxter the Individual Device History
10 Files (“IDHF”) for each and every version of the Liberty Cyclor. The IDHF’s identify when
11 the individual device was built and any subsequent modifications to the device. As
12 Fresenius explained in its interrogatory response, armed with the build date for each
13 device, Baxter can identify for itself— in precisely the same manner that Fresenius would
14 do so—the information requested by its Interrogatory No. 11, because all of the approved
15 (known as “ECO’d”) documents concerning the Liberty Cyclor are dated.

16 Fresenius argues that Plaintiffs can obtain the requested information relating to any
17 particular Liberty Cyclor by identifying the cyclor’s build date from the documents produced
18 [IDHF’s and other documents] and testimony obtained, and then locating within the
19 production the hardware and software versions ECO’d immediately preceding that build
20 date.)

21 Baxter’s motion fails to make clear that its interrogatory calls for the identification of
22 literally thousands of documents for each of the many versions of the Liberty Cyclor that
23 have been used since early developmental testing of the product. Essentially, Baxter asks
24 Fresenius to prepare massive charts correlating the thousands of documents that are
25 responsive to this request with each of the numerous product builds. The burden of that
26 exercise, while massive and unnecessary, is the same for Baxter as it is for Fresenius. See
27 *United States ex rel Englund v. Los Angeles County*, 235 F.R.D. 675, 680 (E.D. Cal. 2006)
28 (“[W]here the information is contained in business records and answering the question

1 would require the responding party to engage in burdensome or expensive research, the
2 responding party may answer by specifying the records from which the answer may be
3 obtained.”).

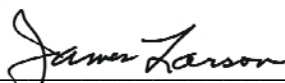
4 Fresenius does not maintain this information in this form. Instead, before
5 responsibilities for the Liberty were transferred from R&D to manufacturing, this information
6 was maintained in chronological order in the DHF and in an electronic database. The Bates
7 ranges for the DHF production and for the IDHF within Fresenius’ production have been
8 identified, and any additional relevant documents will be identified for Baxter once
9 produced. Fresenius contends that by following the method described above and in the
10 interrogatory response, Baxter can easily categorize the documents in the manner it
11 desires. As Plaintiffs have recognized in their own interrogatory responses, Rule 33(d)
12 makes it entirely appropriate to shift the burden of that exercise to the requesting party
13 when, as here, “the burden of deriving or ascertaining the answer will be substantially the
14 same for either party.”

15 Conclusion and Order

16 This Court finds that the burden of ascertaining the information responsive to
17 Interrogatory 11 would be substantially the same for either party. Accordingly, Fresenius
18 has properly made use of the business records option in responding to the interrogatory
19 and Baxter’s motion is be denied.

20 IT IS SO ORDERED.

21 DATED: December 15, 2008

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24 JAMES LARSON
Chief Magistrate Judge

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